delivery and defective materials. The Bank, as holders for value, sought and obtained summary judgment on the bills, the court not being aware of the fact that the Bank had not paid the face value of the bills. On appeal, the Court of Appeal held that while there was no defence in law to the claim for the full amount of the bills, a stay of execution would be granted of the 27 per cent for which the Bank was trustee for its customers. Clearly, whilst the principle of law enunciated in the above case is that a defendant can raise any defence or set-off which he would have available against the person who was really behind the transaction, the facts of that case are distinguishable with the present one. Here, according to the affidavit evidence (enclosure 12) of Mr. Gay Thiam Whatt, the loan officer of the plaintiff Bank, the acceptance of the bill by the defendant was a clear unconditional acceptance which was unqualified in clear and unequivocal terms. Even the protest deed (exhibit 4) is clear that one Mr. Ong (a person in charge) had admitted he would pay up the said bill in two instalments. It appears that the defendant's managing director, Mr. Ong Tat Sam, in his affidavit (enclosure 11) had stated that the defendant was entitled to 3% commission of the total sales and services allowances from the drawer. On the basis of Mr. Gay's affidavit, I find the acceptance of the bill is general within section 19(1) of the Bills of Exchange Act 1949 (Act 204). For the above reasons, I am of the opinion that the *Barclays Bank Ltd.*[1] does not apply and in the event there is no triable issue raised by the defendant in the defence.

Lastly, Miss Neoh raised the question of rate of exchange. Under the particulars to paragraph 4 of the statement of claim, the exchange rate of Malaysian ringgit to the Singapore dollar was based on the prevailing rate as at September 2, 1986. According to counsel, this is defective because it does not comply with section 72(d) of the Bills of Exchange Act 1949. This sub-section provides that where the bill is drawn out of the Federation but payable in this country and the sum payable is not expressed in the currency of the Federation, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day on which the instalment is payable. It should be noted that section 72 applies to matters where a conflict of laws arises. According to a commentary in *Halsbury's Laws of England,* "these special provisions in the statute are more in the nature of practical expedients suited to the convenience of special cases than attempts to meet the difficulty of a conflict of laws." (4th Ed. Vol. 4, para. 489). Therefore, in the present case, the debt incurred by the defendant was payable in Singapore dollars amounting to S$26,855.92 and the plaintiff was entitled to recover the judgment debt even without converting it to the ringgit. Yet, the plaintiff did calculate the sum in the ringgit at the exchange rate as at September 2, 1986. The plaintiff must have done this for convenience. In my judgment, the section does not apply to a judgment debt and therefore the calculation of the exchange rate as at September 2, 1986 does not breach section 72(d) of the Act.

For the above reasons, this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Presgrave & Matthews; Tan, Yu & Co.*

LEE KAM CHUN v. SYARIKAT KUKUH MAJU SDN. BHD. (SYARIKAT PERUMAHAN PEGAWAI KERAJAAN SDN. BHD., GARNISHEE)

[A.C.J. (Peh Swee Chin J.) December 11, 1987]

[Ipoh – Civil Suit No. 24-361-86]

Contract – Building contract – Retention sum held by employer – Whether judgment-creditor has right to this sum in garnishee proceedings – Principles applicable – Termination of building contract – Effect of.

The plaintiff (the judgment-creditor) had obtained judgment for a certain sum against the defendant (the judgment-debtor) for work done. The judgment-debtor was at all material times a contractor of his employer, the garnishee in the present proceedings. An order of garnishee to show cause, which was obtained *ex parte* by the judgment-creditor against the garnishee, was served on the garnishee. Due to certain breaches of the building contract, the garnishee terminated the contract between them and the defendant and had appointed another contractor to carry on the work.

The question in the present case was whether the retention money held in the hands of the employer (the garnishee) is attachable at the instance of a judgment-creditor or the judgment-debtor. The learned Registrar gave judgment for the judgment-creditor. The garnishee appealed.

The garnishee first contended that the retention money was not due and payable to the judgment-debtor

because the contract between the garnishee and the judgment-debtor had been terminated by notice for breach of conditions on the part of the judgment-debtor. The garnishee was entitled to damages.

It was next contended that by virtue of clause 30 of the contract, if at all the retention money was payable to the judgment-debtor, the architect had not issued the "certificate of practical completion", or "the certificate of completion of making good defects".

The garnishee contended, thirdly, to the effect that clause 30(4)(a) allowed the garnishee to have recourse to the retention sum for payment of money to which it was entitled under the provisions of the contract. Due to the claim for damages by the garnishee for breach of contract and for loss in having to engage other contractors to carry on and complete the work, such claim being consequent to the notice of termination, and also pursuant to clause 25(3)(a) and (d), it had recourse to such retention sum and also had priority over the judgment-creditor.

Held, dismissing the appeal: (1) garnishee proceedings are also execution proceedings except that instead of chattels, debts are attached. It cannot be disputed that a debt is only attachable when it is an existing debt or a debt that has already accrued;

(2) such an existing and accrued debt is still attachable even though payment of it is either deferred or to be made in future;

(3) the retention money concerned here was declared by clause 30(4) as being money held by the garnishee on trust for the judgment-debtor. The implication would be inevitable that the retention money would belong beneficially to the judgment-debtor;

(4) the retention sum in this case is an existing debt and in fact an existing indebted sum that involves the payment, notionally and irresistibly pursuant to an interim certificate issued by the architect, by the garnishee to the judgment debtor and the latter's payment in turn back to the garnishee for retention, with the garnishee holding the money as trustee for the judgment debtor. A debt in respect of such money began to exist in the circumstances and still does exist, and to contend otherwise would be to defy common sense and logic;

(5) if the building contract was terminated only after the order to the garnishee to show cause was served on the garnishee, as in the present case, such notice of termination would not affect the right of the judgment-creditor who should therefore have priority over the garnishee;

(6) although clause 30(4)(b) and (c) provided for even two certificates of the architect to be issued before the retention sum would be refunded to the judgment-debtor, such retention sum could still be attached before the issue of such certificates, for they provided for deferred payment only as security for making good any defective work, in no way impairing the nature of the retention sum as an existing debt with deferred payment;

(7) the appeal was dismissed and the garnishee order absolute was confirmed.

Cases referred to:

(1) *Dunlop & Ranken Ltd.* v. *Hendall Steel Structures Ltd. (Pitchers Ltd., Garnishees)* [1957] 3 All E.R. 344.

(2) *O'Driscoll* v. *Manchester Insurance Committee* (1915) 113 L.T. 683, 688.

(3) *Rayack Construction Ltd.* v. *Lampeter Meat Co. Ltd.* (1979) 12 B.L.R. 34.

(4) *Grant Plant Hire* v. *Trickey (Beaconsfield Urban Dist. Council, Garnishee)* (1961) 105 Sol. J. 255.

CIVIL SUIT.

K.O. Tang for the garnishee/appellant.
Tony Wong for the plaintiff/respondent.

Cur. Adv. Vult.

Peh Swee Chin J.: This matter raises a point of considerable controversy, all involved in a number of cases pending that such controversy should at least be laid to rest at least at the level of this court.

The controversy concerns retention money held frequently by a employer of a contractor, or a person in the shoes of such an employer of such a contractor in connection with the usual building contracts which provide in each case for a small percentage of value for work done by the contractors to be deducted and retained by the employer in order to have recourse to it later, usually for making good any defect in such work.

The controversy turns on the question as to whether such retention sum in the hands of the employer is attachable at the instance of a judgment-creditor of the contractor (the judgment-debtor), by way of garnishee proceedings.

The facts are that the plaintiff (hereafter called judgment-creditor) has obtained judgment for a sum of $83,786.20 against the defendant (hereafter called judgment-debtor) for work done. The judgment-debtor was at all material times a contractor of the garnishee by virtue of a building contract in respect of 30 units of 2-storey terrace-houses at Taiping.

Clause 30 of the building contract provides as follows:

"30.(1) At the period of interim certificate named in the appendix to these conditions the architect shall issue a certificate stating the amount due to the contractor from the employer, and the contractor shall, on presenting any such certificate to the employer, be entitled to payment therefor within the period for honouring certificates named in the appendix to these conditions. Interim valuations shall be made whenever the architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an interim certificate.

(2) The amount stated as due in an interim certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered to or adjacent to the works for use thereon up to and including a date not more than seven days before the date of the said certificate less any amount which may be retained by the employer (as provided in sub-clause (3) of this condition) and less any instalments previously paid under this condition. Provided that such certificate shall only include the value of the said materials and goods as and from such time as they are reasonably, properly and not prematurely brought to or placed adjacent to the works and then only if adequately protected against weather or other casualties.

(3) The employer may retain the percentage of the total value of the work, materials and goods referred to in sub-clause (2) of this condition which is named in the appendix to these conditions as percentage of certified value retained. Provided always that when the sum of the amounts so retained equals the amount named in the said appendix as limit of retention fund or that amounts as reduced in pursuance of clause 16(f) and/or clause 27(e) of these conditions, as the case may be, no further amounts shall be retained by virtue of these sub-clauses.

(4) The amounts retained by virtue of sub-clause (3) of this condition shall be subject to the following rules:

(a) The employer's interest in any amounts so retained shall be fiduciary as trustee for the contractor (but without obligations to invest) and the contractor's beneficial interest therein shall be subject only to the right of the employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this contract to deduct from any sum due or to become due to the contractor.

(b) On the issue of the certificate of practical completion the architect shall issue a certificate for one moiety of the total amounts then so retained and the contractor shall, on presenting any such certificate to the employer, be entitled to payment of the said moiety within the period for honouring certificates named in the appendix to these conditions.

(c) On the expiration of the defects liability period named in the appendix to these conditions, or on the issue of the certificate of completion of making good defects, whichever is the later, the architect shall issue a certificate for the residue of the amounts then so retained and the contractor shall on presenting any such certificate to the employer, be entitled to payment of the said residue within the period for honouring certificate named in the appendix to these conditions."

It will be apparent that the building contract is of a fairly common type. To enable the judgment-debtor/contractor to get on with the work, the architect would issue an interim certificate for total value of the work done and of the materials and goods supplied, subject to a retention at the rate of 10% of such value as provided in the appendix to the contract.

Clause 30(4)(a) would appear practically to declare such retention sum as money belonging beneficially to the judgment-debtor and held by the employer/garnishee as a trustee, and that by clause 30(4)(b), a refund of ½ of such retention sum would be made to the judgment-debtor on the issue of a "certificate of practical completion", *i.e.* in effect a certificate of substantial completion by the architect, and clause 30(4)(c) provides that on the expiry of the defects-liability period (12 months according to the appendix), or on the issue of "certificate of completion of making good defects", whichever is the later, the architect would issue a certificate for the residue of such retention to be paid.

An order of garnishee to show cause, which was obtained *ex parte* by the judgment-creditor against the garnishee, herein dated September 15, 1986 was served on the garnishee on September 18, 1986.

According to the garnishee, an employer of the judgment-debtor with the latter as its contractor, it had by letter dated September 22 1986 terminated the contract between them and had appointed another contractor to carry on the work.

It may be interesting to point out that the retention sum in question now totals approximately $313,000 and the work for which the judgment was obtained by the judgment-creditor was performed at the site of the garnishee in question for the benefit of the garnishee.

The dispute between the garnishee and the judgment-creditor was referred by me to be heard before the learned Registrar who decided after a hearing in favour of the judgment-creditor, and from her decision the garnishee has appealed to me.

Before me, the garnishee first contended that the retention was not due and payable to the judgment-debtor, because the contract between the garnishee and the judgment-debtor had been terminated by notice for breach of conditions on the part of the judgment-debtor. The garnishee was entitled to damages and accounts were being prepared to determine the amount of damages for breach of contract.

It was next contended that by virtue of clause 30, if at all the retention money was payable to the judgment-debtor, the architect had not issued

the "certificate of practical completion", or "the certificate of completion of making good defects".

The garnishee contended, thirdly, to the effect that clause 30(4)(a) allowed the employer (*i.e.* the garnishee) to have recourse to the retention sum for payment of money to which it was entitled under the provisions of the contract. Due to the claim for damages by the garnishee for breach of contract, and for loss in having to engage other contractors to carry on and complete the work, such claim being consequent to the notice of termination, and also pursuant to clause 25(3)(a) and (d), it had recourse to such retention sum and also had priority over the judgment-creditor.

Clause 25(3)(a) and (d) provides as follows:

"25.(1) If the contractor shall make default in any one or more of the following respects, that is to say:

(a) If he without reasonable cause wholly suspends the carrying out of the works before completion thereof, or

(b) If he fails to proceed regularly and diligently with the works, or

(c) If he refuses or persistently neglects to comply with a written notice from the architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the works are materially affected, or

(d) If he fails to comply with the provisions of clause 17 of these conditions,

then the architect may give him a notice by registered post or recorded delivery specifying the default, and if the contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the employer, without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the employment of the contractor under this contract provided that such notice shall not be given unreasonably or vexatiously.

(2) In the event of the contractor becoming bankrupt or making a composition or arrangement with his creditors or having a winding up order made or (except for purposes of reconstruction) a resolution for voluntary winding up passed or a receiver or manager of his business or undertaking duly appointed, or possession taken by, or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the floating charge, the employment of the contractor under this contract shall be forthwith automatically determined but the said employment may be reinstated and continued if the employer and the contractor his trustee in bankruptcy liquidator receiver or manager as the case may be shall so agree.

(3) In the event of the employment of the contractor being determined as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the employer and contractor:

(a) The employer may employ and pay other persons to carry out and complete the works and he or they may enter upon the works and use all temporary buildings, plant, tools, equipments, goods and materials intended for, delivered to and placed on or adjacent to the works, and may purchase all materials and goods necessary for the carrying out and completion of the works.

(b) ...

(c) ...

(d) The contractor shall allow or pay to the employer in the manner hereinafter appearing the amount of any direct loss and/or damage caused to the employer by the determination. Until after completion of the works under paragraph (a) of this sub-clause, the employer shall not be bound by any provision of this contract to make any further payment to the contractor, but upon such completion and the verification within a reasonable time of the account therefor the architect shall certify the amount of expenses properly incurred by the employer and the amount of any direct loss and/or damage caused to the employer by the determination, and if such amounts when added to the monies paid to the contractor before the date of determination exceed the total amount which would have been payable on due completion in accordance with this contract, the difference shall be a debt payable to the employer by the contractor; and if the said amounts when added to the said monies be less than the said total amount, the difference shall be a debt payable by the employer to the contractor."

I will set out what, in my judgment, would be the correct principles relevant to the matters in the light of which the contention of the garnishee can be disposed of for reasons which will then become self-apparent.

Garnishee proceedings are but execution proceedings also, except that instead of chattels, debts are attached. I do not think it can be disputed that a debt is only attachable when it is an existing debt, or a debt that has already accrued; the authority for this proposition is *Dunlop & Ranken Ltd.* v. *Hendall Steel Structures Ltd. (Pitchers Ltd., Garnishees).*[1]

Such an existing and accrued debt is still attachable even though payment of it is either deferred or to be made in future, that is, such a debt is of a description mentioned by Bankes L.J. in *O'Driscoll* v. *Manchester Insurance Committee*[2] as *debitum in praesenti solvendum in futuro* and such debt was described by Bankes L.J. as attachable.

Again, the retention money concerned herein is declared by clause 30(4)(a) as being money held by the garnishee on trust for the judgment debtor. The implication would be inevitable that the retention money would belong beneficially to the judgment-debtor. In fact, in *Rayack Construction Ltd.* v. *Lampeter Meat Co. Ltd.*[3], a clause identical to clause 30(4)(a) herein came up for the court's interpretation in connection with a declaration being sought by a contractor from the court as regards his employer that the employer was obliged to pay the retention sum into a separate bank account to hold the same in trust for the contractor and consequential injunctions, Vinelott J. allowed the declaration there. The object would appear to ensure that any potential judgment creditor of the employer would not execute in error his judgment on such retention sum.

One cannot lose sight of the fact also that the retention sum was deducted for value of work already and actually done and materials already and actually supplied as certified by the architect to be due.

In my judgment, the retention sum in this case is an existing debt and in fact an existing indebted sum that involves the payment, notionally and irresistibly pursuant to an interim certificate issued by the architect, by the garnishee to the judgment-debtor and the latter's payment in turn back to the garnishee for retention for purposes already stated, with the garnishee holding the money as trustee for the judgment debtor. A debt in respect of such money began to exist in the circumstances and still does exist, and to contend otherwise would be to defy common sense and logic.

I have no doubt that for damages and loss to be quantified by a court or an arbitrator later for alleged breach of contract on the part of the judgment debtor, the garnishee could have the right to dip into such retention money for satisfaction, but this would depend on one crucial point. If the contract was terminated only after the order to the garnishee to show cause was served on the garnishee, such notice of termination would not affect the right of the judgment creditor who should therefore have priority over the garnishee. Here, the order to the garnishee to show cause was served before the notice of termination of the contract was issued. Please see the judgment of the English Court of Appeal in *Grant Plant Hire* v. *Trickey (Beaconsfield Urban District Council, Garnishee).*[4]

Although clause 30(4)(b) and (c) provide for even two certificates of the architect to be issued before the retention sum would be refunded to the judgment-debtor, such retention sum could still be attached before the issue of such certificates, for they provide for deferred payment only, mentioned by me earlier, as security for making good any defective work, in no way impairing the nature of the retention sum as an existing debt with deferred payment.

For comparison purpose, an interim certificate for payment of value of work done would create a debt but a certificate of practical completion under clause 30(4)(a) or a certificate of completion of making good defects would not create an existing debt but merely indicates the time of refund of the retention sum.

In the light of what has been stated above, the three contentions of the garnishee will therefore fall to the ground.

I would therefore dismiss the appeal with costs and confirm the garnishee order absolute made by the learned Registrar.

Appeal dismissed.

Solicitors: *Thevin Chandran Siva Wong & Jamal; Ariff & Co.*

CHIN CHEN FUI v. MAJLIS PERBANDARAN SANDAKAN

[O.C.J. (Abu Mansor J.) December 1, 1987]

[Sandakan – Civil Suit No. S. 164 of 1985]

Local Government – Appointment of Deputy President of the Sandakan Municipal Council – Appointment approved by Minister – Salary paid out of Council's funds – Who was the employer – Whether contract of employment frustrated – Summary judgment sought – Local Government Ordinance 1961, ss. 53 & 63.

The plaintiff in this case was a qualified architect. The present dispute related to his appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan.

On January 17, 1985 the then Chief Minister of Sabah asked the plaintiff to submit his proposal of the terms and conditions for appointment as Timbalan Presiden (1) of the Majlis Perbandaran Sandakan for a period of two years. The plaintiff duly submitted his proposal which was agreed to by the Chief Minister. The Minister of Town and Country Development also approved the plaintiff's appointment. The defendant duly put the plaintiff to work, as required by the state government, to study and review the local authority's administration and financial management.